

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

In the Matter of the Petition of)
)
CHEMICAL & PIGMENT CO.)
)
For Review of Order No. 87-074, Waste)
Discharge Requirements of the)
California Regional Water Quality)
Control Board, San Francisco Bay)
Region. Our File No. A-491.)
_____)

ORDER NO. WO 88-3

BY THE BOARD:

On June 17, 1987, the California Regional Water Quality Control Board, San Francisco Bay Region (Regional Board) issued waste discharge requirements (requirements) in Order No. 87-074 to Chemical & Pigment Co. (discharger and petitioner). The requirements include a finding that the discharger has surface impoundments on its property which are subject to the Toxic Pits Cleanup Act of 1984 (Health and Safety Code Section 25208 et seq.; TPCA), and also specifications and provisions requiring compliance with TPCA. On July 15, 1987, the State Water Resources Control Board (State Board) received a timely petition for review of the requirements from the petitioner.¹

I. BACKGROUND

The discharger manufactures chemical products which consist primarily of zinc-based compounds with sulfate, iron sulfate, and ammonium. These

¹ In a letter dated November 5, 1987, the petitioner requested a hearing before the State Board. This request did not comply with the regulatory requirements for such a request. (Title 23, California Administrative Code, Section 2050(b).) The request for a hearing is denied.

products are processed from zinc ash, ammonia, and hydrochloric and sulfuric acids.

The discharger's facility includes a surface impoundment and bunkers which contain hazardous levels of zinc. The surface impoundment collects zinc spillage or drippings from valves and pumps used in the manufacturing process. It also receives stormwater runoff, boiler blowdown, water softener solution, and sodium hydroxide solution. The liquids in the impoundment are returned to the manufacturing process and are reused for their zinc content. Periodically, sludges from the impoundment are excavated and placed in the bunkers. Thereafter, the sludges are also returned to the processing facilities. The first time that the surface impoundment was cleaned out after the effective date of TPCA (January 1, 1985) was on October 7, 1985.

II. CONTENTIONS AND FINDINGS

1. Contention: The petitioner claims that the surface impoundment is not subject to TPCA.

Finding: The Toxic Pits Cleanup Act of 1984 contains restrictions and prohibitions on the discharge of liquid hazardous wastes and hazardous wastes containing free liquids to surface impoundments. TPCA includes a prohibition, effective June 30, 1988, against discharging liquid hazardous wastes or hazardous wastes containing free liquids to surface impoundments which are within one-half mile upgradient of a potential source of drinking water. (Health and Safety Code Section 25208.4.)² There is also a

² Unless otherwise noted, all statutory references are to the Health and Safety Code.

prohibition against discharging such wastes to a surface impoundment, on or after January 1, 1989, unless the surface impoundment is double lined, is equipped with a leachate collection system, and groundwater monitoring is conducted. (Section 25208.5.) All persons discharging such wastes to surface impoundments must submit a detailed hydrogeological assessment report (HAR), which fully characterizes the site and the wastes contained in the surface impoundment, and determines whether leakage is occurring or is threatened. (Section 25208.8.)

The petitioner's chief contention is that the hazardous materials discharged into its surface impoundment are not "wastes". Rather, the petitioner characterizes its operation of the surface impoundment as placement of "materials" for "reuse" in its manufacturing process. The Regional Board concedes that the materials placed in the surface impoundment are later reused in the manufacturing process, but it claims that such procedures constitute "recycling" and that the materials are "recyclable materials" within the meaning of the Health and Safety Code, and, as such, are "hazardous wastes".

As will be seen below, the critical definitions of terms, and the provisions governing regulation of hazardous waste, are all found in Chapter 6.5 of Division 20 of the Health and Safety Code. The Department of Health Services is the chief administrative agency responsible for enforcing the provisions of Chapter 6.5. While the State Board and the Regional Boards have primary responsibility for administering TPCA, the Department has primary responsibility for most of the programs included in the Chapter. In addition, the Department has responsibility to promulgate regulations implementing the definition sections and the general regulatory sections of Chapter 6.5. The Department has adopted such regulations.

Given the Department's primary role in determining what substances are considered to be hazardous wastes, the Regional Board called upon the Department to investigate the petitioner's facility and to determine whether hazardous wastes were being discharged to the surface impoundment. The Department did conduct an inspection and submitted a report to the Regional Board which concluded that liquid hazardous wastes have been discharged to the surface impoundment since the enactment of TPCA.³ It is an accepted principle that the interpretation of a statute by the administrative agency charged with its enforcement and implementation is entitled to great weight. (58 Cal. Jr. III, "Statutes", pages 573-574.) Therefore, we will follow the Department's determinations unless clearly erroneous. In this case, we find the Department's analysis persuasive.

Definition of Hazardous Waste

TPCA defines "hazardous waste" as "a waste that is a hazardous waste, as specified in this chapter". (Section 25208.2(k).) TPCA is a part of Chapter 6.5 of Division 20 of the Health and Safety Code. Article 2 of Chapter 6.5 (Section 25110 et seq.) contains the definitions which govern construction of the chapter. (Section 25110.) "Hazardous waste" is defined in Section 25117:

"'Hazardous waste' means a waste, or combination of wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may either:

³ The report, dated March 17, 1988, was signed by C. David Willis, Deputy Director of the Department. A copy of the report was furnished to the petitioner who submitted written comments to the Regional Board. The inspection by the Department was conducted at the request of the petitioner. We have supplemented the Regional Board record to include the report and related documents. (Title 23, Calif. Code of Regulations, Section 2064.)

(a) Cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness.

(b) Pose a substantial present or potential hazard to human health or environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

Unless expressly provided otherwise, the term 'hazardous waste' shall be understood to also include extremely hazardous waste."

The Department of Health Services has adopted regulations implementing Section 25117, which include hazardous levels for specific constituents.

(Title 22, California Administrative Code, Section 66001 et seq.) The petitioner concedes that the zinc in its surface impoundment is at a hazardous level. It must still be determined whether the material is a waste.

"Waste" is defined in Section 25124:

"'Waste' means any of the following:

(a) Any material for which no use or reuse is intended and which is to be discarded.

(b) Any recyclable material.

(c) Any material which poses a threat to public health or the environment and which meets either, or both, of the following conditions:

(1) Is mislabeled or is not adequately labeled, unless the material is correctly labeled or adequately labeled within 10 days after the material is discovered to be mislabeled or inadequately labeled.

(2) Is packaged in deteriorated or damaged containers, unless the material is contained in sound or undamaged containers within 96 hours after the containers are discovered to be deteriorated or damaged."

If the material in the impoundment is either a waste product which is intended to be discarded, or a "recyclable material", then it is a hazardous waste, and therefore subject to TPCA.

The term "recyclable material" is defined in Section 25120.5:

"'Recyclable material' means a hazardous waste that is capable of being recycled and is any one of the following:

- (a) A residue.
- (b) A spent material, including, but not limited to, a used or spent stripping or plating solution or etchant.
- (c) A material that is contaminated to such an extent that it can no longer be used for the purpose for which it was originally purchased or manufactured.
- (d) Any material which, if it is to be recycled, is regulated by the Environmental Protection Agency pursuant to Subtitle C of Public Law 94-580, as amended (the Resource Conservation and Recovery Act of 1976, 42 U.S.C. Sec. 6901 et seq.).
- (e) Any retrograde material that has not been used, distributed, or reclaimed through treatment by the original manufacturer or owner by the later of the following dates:
 - (1) One year after the date when the material became a retrograde material.
 - (2) One year after the material is returned to the original manufacturer."

"Recycle" is also defined:

"'Recycle' means to use, reuse, or reclaim a hazardous waste or a substance from a hazardous waste, and includes the recovery of resources from a hazardous waste."
(Section 25121.)

From the above, it can be seen that if a hazardous waste is capable of being recycled--which is defined to include reuse--and it is a residue from an earlier operation, then it is a "recyclable material", and a hazardous waste. It appears that the statutory scheme which includes TPCA intends to regulate precisely the type of material contained within the discharger's surface impoundment. Residue from the processing facilities is captured and discharged to the impoundment for later reuse in production.

To counter this conclusion, the petitioner points out a difficulty in the drafting of the definitions discussed above. The petitioner points to the circular nature of these definitions. In short, "waste" is defined to include "recyclable material", but "recyclable material" must be found to be a hazardous "waste". The petitioner argues that the material in its ponds, while

subject to reuse or recycling, has not been proven to be "waste", and therefore does not fit within the definition of "recyclable material".

The petitioner is correct that these definition sections are somewhat circular in that wastes include recyclable materials, but substances are recyclable materials only if they are wastes. Where statutory language is ambiguous on its face, it is necessary to interpret the language in a manner consistent with the Legislature's intent. (58 Cal.Jur.III, "Statutes", pages 560-561.) To discern the legislative intent, we have reviewed the available legislative history of these sections and of other related provisions.

Earlier Statutory Provisions Regarding Recycling

The issue of recycling was first addressed in the 1972 amendments to the Hazardous Waste Control Law. (Stats. 1972, C. 1236, p. 2388.) At that time, "waste" was defined as "any material for which no use or reuse is intended and which is to be discarded". (Former Section 25122, added by Stats. 1972, c. 1236, p. 2389.) Recyclable materials were not expressly included in this definition. However, the term "recycle" was defined to mean: "to process, alter or otherwise treat hazardous waste for subsequent use." (Former Section 25121, added by Stats. 1972, c. 1236, p. 2388.)⁴

In 1980, the definition of "waste" was amended to include "any recyclable material". (Former Section 25122, amended by Stats. 1980, c. 878,

⁴ This definition was revised in 1977 as follows:

"'Recycle' means to redirect or utilize a waste or substance from a waste in a manner that, in the judgment of the Department of Health Services, will not result in a substantial hazard to the health or safety of persons, domestic livestock or wildlife." (Former Section 25121, amended by Stats. 1977, c. 1039, p. 3144.)

p. 2757.) At that time, the Legislature stated that this addition was intended to clarify the intent of the previously existing definition and was not a change in that definition. (Section 13 of Stats. 1980, c. 878, p. 2759.) This expression of legislative intent indicates that the Legislature had always intended recyclable materials to be treated as hazardous wastes under the Hazardous Waste Control Law.

The 1980 amendments to the Hazardous Waste Control Law also included a definition of "recyclable material":

"(a)'Recyclable material' means any material that would be considered a hazardous waste but for the fact that both of the following conditions exist:

(1) Some use or reuse of such material may be intended and can be demonstrated.

(2) Such material is either of the following:

(A) A spent, contaminated, or used material, or a process effluent or residue, which has been transferred by the producer of such material, effluent, or residue to an unrelated or unaffiliated person for both of the following purposes:

(i) Recycling or treatment.

(ii) Subsequent sale.

(B) Any retrograde material that has not been used or reclaimed through treatment by the original manufacturer or owner by the later of the following dates:

(i) One year of the date when such material became a retrograde material.

(ii) One year after return to the original manufacturer.

(b) 'Recyclable material' does not include any of the following:

(1) A chemical intermediate.

(2) A byproduct that in its existing state meets all of the following requirements:

(A) Has a commercial use.

(B) Is ordinarily used as a commodity in trade by the industrial or agricultural community.

(C) The reclamation operation poses no significant hazard to public health and safety, or to domestic livestock, wildlife, or the environment.

(3) A material that is routinely reclaimed by a third party for reuse by the original manufacturer of the material.

(4) A material that is routinely reclaimed by an original manufacturer of such material, provided the

reclamation is only a portion of such original manufacturer's normal production of such material." (Former Section 25122.5, added by Stats. 1980, c. 878, p. 2757, emphasis added.)

We note that this definition of "recyclable material" did not include a requirement that recyclable materials be wastes. Rather, they are materials that would be considered hazardous waste but for their reuse. Thus, in the 1980 amendments, the definitions sections did not contain the circular quality present in the current language. It was clear that any materials, which were reused and met any of the criteria contained in former Section 25122.5(a)(2), could constitute recyclable materials and hazardous wastes.

The Legislature's intent to regulate recyclable materials as hazardous wastes is also indicated by the 1980 revisions to the definition of "recycle" in Section 25121. The requirement in the 1977 version that the Department of Health Services (Department) find that management of the substance will not result in a substantial hazard, was deleted. Instead, Section 25121 was amended to read:

"'Recycle' means to redirect or utilize a hazardous waste or a substance from a hazardous waste, and includes recovery of resources from a hazardous waste." (Former Section 25121, amended by Stats. 1980, c. 878, p. 2756.)

Since materials which are to be recycled were treated as hazardous waste, it was not necessary for the Department to make this finding. The strict regulations for handling of hazardous waste would apply in any event.

The Current Statutory Scheme

In 1985, the Legislature again revised the statutory language regarding recycling, and its relationship to hazardous waste regulations.

(Stats. 1985, c. 1594.) These amendments constitute the current statutory scheme. The portions of the definition of "waste" regarding "recyclable materials" are unchanged from the 1980 amendment.⁵ Thus, "recyclable materials" are still considered "waste". The definition of "recyclable material", however, was amended. The revised definition was renumbered as Section 25120.5:

"'Recyclable material' means a hazardous waste that is capable of being recycled and is any one of the following:

- (a) A residue.
- (b) A spent material, including, but not limited to, a used or spent stripping or plating solution or etchant.
- (c) A material that is contaminated to such an extent that it can no longer be used for the purpose for which it was originally purchased or manufactured.
- (d) Any material which, if it is to be recycled, is regulated by the Environmental Protection Agency pursuant to Subtitle C of Public Law 94-580, as amended (the Resource Conservation and Recovery Act of 1976, 42 U.S.C. Sec. 6901 et seq.).
- (e) Any retrograde material that has not been used, distributed, or reclaimed through treatment by the original manufacturer or owner by the later of the following dates:

⁵ A new subsection regarding materials which are subject to deficiencies in labelling or packaging was added. Former Section 25122 was also renumbered as Section 25124. Section 25124 now reads:

"'Waste' means any of the following:

- (a) Any material for which no use or reuse is intended and which is to be discarded.
- (b) Any recyclable material.
- (c) Any material which poses a threat to public health or the environment and which meets either, or both, of the following conditions:
 - (1) Is mislabeled or is not adequately labeled, unless the material is correctly labeled or adequately labeled within 10 days after the material is discovered to be mislabeled or inadequately labeled.
 - (2) Is packaged in deteriorated or damaged containers, unless the material is contained in sound or undamaged containers within 96 hours after the containers are discovered to be deteriorated or damaged." (Renumbered and amended by Stats. 1985, c. 1594.)

(1) One year after the date when the material became a retrograde material.

(2) One year after the material is returned to the original manufacturer."

Under the new definition, "recyclable material" was no longer "any material that would be considered hazardous waste but for [being recycled]." Instead, "recyclable material" was "a hazardous waste that is capable of being recycled" and meets one of the listed criteria. In reviewing the new statutory scheme, we conclude that the legislative intent was not to narrow the scope of materials that are considered recyclable. Rather, the intent appears to be one of clarification, and, in some instances, of broadening the scope of materials considered to be recyclable.

For example, the general definition language contained in former Section 25122.5 is broader than that in current Section 25120.5 (the 1980 and 1985 definitions of "recyclable material", respectively). Under former Section 25122.5, it was necessary to show that actual recycling had taken place for material to qualify as being recyclable. The amended version requires only that the material be "capable of being recycled". The change appears to be intended to close a loophole for material which had not in fact been recycled, but which also may not have been intended to be discarded. It does not appear to be designed to limit the materials considered recyclable under the prior definition.

Evaluation of Materials Contained in Petitioner's Surface Impoundment

After inspecting the petitioner's surface impoundment, the Department concluded on three grounds that the surface impoundment is subject to TPCA in that the petitioner has discharged liquid hazardous wastes to the impoundment since the effective date of the act. First, the petitioner applied for a

hazardous waste facility permit for the surface impoundment in 1984. The application shows that the pond contained stormwater runoff and boiler and scrubber blowdown. The petitioner has admitted to this Board that the pond was not cleaned out until October 7, 1985. These documents act as an admission of discharge of hazardous wastes.

Second, the Department relied on the extensive evidence which the inspector observed that process material leaked, spilled or was deposited on the ground. Given the disposal of these materials to land, the Department concluded that the materials constituted waste, and the portion of the spilled materials which entered the impoundment retained the characteristic of waste.

Third, the Department concluded that because the petitioner used the process materials in a manner constituting disposal of the material (by virtue of spillage onto land), the materials must be regulated as a waste. The Department refers here to Section 25143.2, which describes circumstances under which recyclable materials are to be regulated as hazardous wastes or are to be excluded from such regulation. As was stated above, Section 25120.5 defines recyclable materials as hazardous wastes. Section 25143.2 describes the situations in which recyclable materials would be subject to the Hazardous Waste Control Law, which includes TPCA. Section 25143.2(c) provides:

"Notwithstanding subdivision (b), all of the following recyclable materials are subject to the requirements of this chapter which apply to hazardous waste. (1) Any material used in a manner constituting disposal of the material...."⁶

⁶ Section 25143.2(b) includes exemptions for certain recyclable materials from regulation as hazardous wastes. We note that it is not clear that an exemption pursuant to Section 25143.2(b) would remove a discharger from regulation by TPCA since provisions of TPCA state that "notwithstanding any

(CONTINUED)

In reviewing the Department's analysis, we agree with the conclusion that the surface impoundment has received liquid hazardous wastes and is subject to TPCA. The surface impoundment has been operated as a hazardous waste facility and has received hazardous wastes which have been deposited at the facility and been directed into the impoundment. We see no basis for rejecting the Department's conclusions in this matter.

2. Contention: The petitioner claims that if its surface impoundment is subject to TPCA, then the required closure of the impoundment constitutes an unconstitutional taking by the government, without just compensation.

Finding: As we have stated in previous orders, the California Constitution prohibits state agencies from declaring a statute unconstitutional. (California Constitution, Art. 3, Section 3.5.) Therefore, we will not review this contention. By our silence, however, we certainly do not imply our concurrence in the petitioner's view.

III. SUMMARY AND CONCLUSIONS

1. The contents of the petitioner's surface impoundments include liquid hazardous wastes, and the impoundment is subject to the Toxic Pits Cleanup Act of 1984.

2. We decline to review the petitioner's claim that the Toxic Pits Cleanup Act of 1984 is unconstitutional.

⁶ (FOOTNOTE CONTINUED)

other provision of law" persons who discharge liquid hazardous wastes or hazardous wastes containing free liquids, as defined in the chapter, are subject to regulation. (See, e.g., Section 25208.4.) Because the discharger is subject to regulation pursuant to Section 25143.2(c), we need not decide this issue here.

IV. ORDER

The petition is denied.

CERTIFICATION

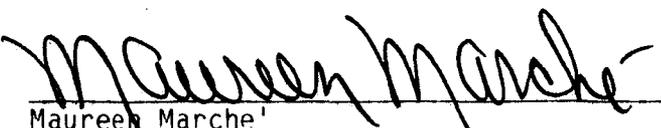
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on June 16, 1988.

AYE: W. Don Maughan
Danny Walsh
Edwin H. Finster

NO: Darlene E. Ruiz
Eliseo M. Samaniego

ABSENT: None

ABSTAIN: None


Maureen Marche
Administrative Assistant to the Board